IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1338 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

MEENABEN NAGINKUMAR CHAUHAN

Versus

NAGINKUMAR NAROTTAMDAS CHAUHAN

Appearance:

1. Civil Revision Application No. 1338 of 2001

MR ASHUTOSH R BHATT for Petitioner No. 1

MR CL SONI for Respondent No. 1

MR GAURANG K PATEL for Respondent No. 1

CORAM : MR.JUSTICE J.R.VORA

Date of decision: 26/02/2003

ORAL JUDGEMENT

Ld. advocates for the parties have requested to hear this revision application finally, and so the matter

is heard finally.

This revision application is preferred against an order passed by the ld. Jt. District Judge, Bhavnagar on 30.6.2001 below Misc.Civil Application No. 190/99 for condonation of delay in filing appeal against the decree passed by the trial court in HMP No. 90/98.

The present applicant-wife married with the present opponent-husbnad and after some time the co-existence was not possible between the parties and wife started living separately from husband. The marriage was solemnized at Ahmedabad and a son was born, who is at present 5 to 6 years of age and with the wife.

After separation, the present applicant filed an application under sec. 125 of CrPC for maintenance against the present opponent-husband. The said criminal application for maintenance is pending before the Metropolitan Magistrate Court.

In the meantime, since the opponent-husband is resident of Bhavnagar, he filed HMP under sec. 9 in the Court of Civil Judge (SD) at Bhavnagar for restitution of conjugal rights. As per the allegation of opponent-husband, notice and summons of the said proceedings i.e. HMP No. 90/98 was duly served upon the applicant but she had chosen not to appear before the Court in the said proceedings and hence, the ex-parte decree on 19.2.99 came to be passed in favour of present opponent-husband for the restitution of conjugal rights.

Now as per the case of the present applicant-wife, she came to know about the passing of the decree in the said proceedings only on 2.9.1999 when opponent-husbnad produced the certified copy of the decree passed in HMP No. 90/98 on the record of application filed by the wife for maintenance pending before the Metropolitan Magistrate Court, Ahmedabad. It is the case of the applicant that, therefore, she applied for the certified copy on 7.10.99 and preferred an appeal in the Court of District Judge, at Bhavnagar on 7.10.99 against an ex-parte decree passed in HMP No. 90/98 along with an application numbered as Civil Misc. Application No. 190/99 for condonation of delay under sec. 5 of the Limitation Act. Considering the date of passing of the decree in HMP No. 90/98 i.e. 19.2.99, the appeal was delayed by 7 months and 18 days. The applicant contended that she came to know about the passing of the decree against her only on 2.9.99 when such papers were produced in the Court of Metropolitan Magistrate in the

proceedings which were filed by the wife for maintenance. According to the applicant, though there was no delay in filing the appeal in the above said circumstances, but if there was any delay then she requested to condone the same and requested to permit her to file appeal against the decree passed in HMP No. 90/98.

Ld. Jt. District Judge, Bhavnagar heard both the parties. Written arguments which were submitted by the applicant also taken into consideration and ultimately ld. Jt. District Judge, Bhavnagar rejected the application for condonation of delay vide order impugned in this revision application.

Ld. advocate for the petitioner Mr AR Bhatt and ld. advocate Mr. CL Soni for the respondent were heard.

On behalf of the petitioner, it was vehemently urged that no notice or summons of the proceedings i.e. HMP No. 90/98 was ever served on wife-petitioner. She was not aware of the proceedings going on ex-parte against her. She came to know about the passing of the decree only when a certified copy was placed on record in Criminal Application pending before the Metropolitan Magistrate, Ahmedabad. Ld. Jt. District Judge, in his order referred deposition of opponent-husband wherein on 7.11.98 he categorically deposed that opponent-husband had filed HMP in the Court of Civil Judge (SD) at Bhavnagar for the restitution of conjugal rights and the matter was placed before the Lok Adalat for compromise. Notice of Lok Adalat was served upon the partied. When these position was confronted to the ld. advocate for the petitioner, it was argued that due to insufficiency of funds, the applicant was not in a position to attend the said HMP filed by the husband at Bhavnagar. It was again submitted that the fact remains that no notice was served upon the applicant in respect of proceedings of HMP No. 90/98. It was submitted that the delay caused in these circumstances was required to be condoned by the ld. Jt. District Judge in the larger interest of justice. It was submitted that as soon as wife came to know about the passing of the decree, certified copy was applied for and the appeal as well as an application for condonation of delay was preferred on 7.10.1999.

On the other hand, ld. advocate Mr. Soni for the respondent drawn the attention of this court towards the observation made by the ld. Jt. District Judge in the impugned order. Ld. Jt. District Judge has referred the rojnama of HMP No. 90/98, wherein it has been noted that notice was issued in pursuance of the

order dated 19.9.98 of the trial court. Ld. Jt. District Judge has further relied upon the rojnama of 15.10.98, wherein it has been noted that the applicant was served with the notice. It was submitted that therefore, the ld. Jt. District Judge rightly come to the conclusion that the notice was served upon the applicant and, secondly, on 7.11.98 the opponent-husband on oath declared before the Metropolitan Magistrate Court that such HMP was filed. Ld. advocate for the respondent has shown a copy of the deposition of the opponent wherein he has deposed that the summons of the Hindu Marriage Petition was served upon the applicant. Therefore, it was submitted that this is not a case of condonation of delay but mere a case of negligence on the part of the applicant because even if it is assumed that notices were not served upon the applicant than on 7.11.1998 through the deposition of the opponent, the applicant fully appraised of the fact that said Hindu Marriage Petition was filed against her and summons was served. It was, therefore, submitted that having regard to the conduct of the applicant, the order impugned requires no interference.

Having regard to the rival contentions and the fact which emerges from the record, the only question which requires to be considered is whether the ld. Jt. District Judge, Bhavnagar came to the correct conclusion as to the sufficiency of the cause for condonation of delay. So far as the revisional jurisdiction is concerned,the order impugned can be examined only by parafernalia as provided by sec. 115 of Civil Procedure Code that is to say whether the trial judge has committed any jurisdictional error, secondly whether any material irregularity is committed in the proceeding and, thirdly, whether the order impugned is illegal. So far as section 5 of the Limitation of the Act is concerned, sufficiency of cause is required to be established by the party who claims condonation of delay irrespective of duration of delay. In this case, the material contention of the applicant is whether due notice of the proceedings of Hindu Marriage Petition was served upon her. Due judicial scrutiny is called for to decide the issue. When a party emphathetically asserts that it was never served by the court about the proceedings then serious examination must ensue. It is jurisdictional duty of the court to examine microscopically whether notice was served to the person who alleges non-service. When the impugned order was examined, it is apparent that ld. judge relied upon the rojnama of the proceedings. It must be borne in mind that a notice singed by the party if service is effected and with an endorsement of the

Bailiff, if service could not be effected is material document to be exhibited on record. Not only that but according to the practice of the trial court, the rojnama must take note of that notice on certain exhibits. Ld. Jt. District Judge, Bhavnagar has taken care to call for the record and inspect the rojnama. What is observed by the ld. Jt. District Judge indicates that a note as to the service of summons to the applicant was found by him in the rojnama. However, the said rojnama is not substantiated by the document i.e. by a copy of the notice signed by the applicant in token of service. This circumstances necessarily suggest that the notice signed or unsigned served or unserved to the applicant was not taken note in the rojnama meaning thereby that either the same was not placed on the record or inadvertently the same has not been exhibited and noted in the rojnama. However, this judicial scrutiny appears not to have undertaken by the ld. Jt. District Judge as it appears from the impugned order. The resulting conclusion from the above is, one cannot say with certainty whether notice of the proceeding was duly served upon the applicant and in fact, she signed the copy of the notice in token of service of notice/summons.

With the above conclusion, the rest of the observation made by the ld. Jt. District Judge, Bhavnagar in respect of deposition of opponent on 7.11.98 is considered, it is clear that what is deposed by the opponent in deposition is in respect of pendency of the proceedings. Nothing turns out from the record as to whether parties attended Lok Adalat and whether any exercise was undertaken for amicable settlement between the parties. The fact which is required to be noted is limitation would start from the date of decree and party who claims condonation is saddled with duty to establish sufficient cause as to limitation which start from the date of decree. What is important in the present matter would be knowledge of applicant about the passing of the decree and not about pendency of the proceedings. This fact again must be viewed with the circumstances revolving around the parties. Marriage life of the applicant and opponent was in doldrums. The relationship between the spouse was so adversely entangled that wife along with the minor child live separately and legal proceedings were resorted by both the parties. In this circumstance, reaction and response of a party to proposition by the other would be different than ordinary and normal. Meaning thereby that in this situation when relationship was strained between the parties to this extent, the deposition of opponent as to the pendency of litigation might have not driven the applicant-wife to

approach the court at Bhavnagar and ascertain about the pendency of litigation. Ordinarily, this may be a normal conduct of any litigating party but when it is not certain that whether notice is served to the applicant-wife it could not be expected that wife would approach the court at Bhavnagar and ascertain whether such litigation was pending. Even the deposition of opponent to the extent that notice was served upon the applicant wife would not lead to believe that the wife acted carelessly or negligently. This aspect of the matter was also required to be taken into consideration by ld. Jt. District Judge, Bhavnagar in coming to the conclusion. The ld. Jt. District Judge, Bhavnagar rejected the application on the reasons, firstly, that the notice was served upon the applicant and secondly, because the applicant knew about the proceedings pending against her through the deposition of opponent given on 7.11.98.

If the above reasonings of the ld. Jt. District Judge, Bhavnagar examined within the permitted scope of revisional jurisdiction as aforesaid, it clearly appears that ld. Jt. District Judge, Bhavnagar has committed jurisdictional error in examining the very important aspect of the matter. Ld. Jt. District Judge also committed illegality to the extent that the party is burdened with the duty to explain the delay caused in filing litigation as envisaged by the Limitation Act and in this case from the date of passing of the decree. The knowledge of the proceedings in the special circumstances and facts of the case, would have no bearing at all in examining even the conduct of the party claiming condonation of delay. The next jurisdictional error which ld. Jt. District Judge committed is in respect of service of notice to the applicant as aforesaid.

In this view of the matter, for the reasons stated above, ld. Jt. District Judge, Bhavnagar ought to have allowed the application of applicant for condonation of delay and hence, this revision application is allowed. The order impugned is set aside. The Civil Misc. Application No. 190/98 is allowed and delay caused for filing an appeal is condoned.

Ld. District Judge, Bhavnagar is further directed to register the appeal and proceed and dispose of the said appeal according to law within three months from the date of receipt of the writ of this court or on production of certified copy of this order by any of the parties to the proceedings. Ld. advocate for the parties are directed to inform the concerned party and

convey the direction of this Court to remain present before the District Judge, Bhavnagar on 12.3.2003. Office is directed to send the writ of this order forthwith, in any case before 12.3.2003.

In view of the above, Civil Application (St) No. 9377/2001 stands disposed of accordingly.

(J.R. VORA, J.)

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